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No. 780.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

PEORIA TRANSIT LINES, INC., a Corporation,
Appellant,

v.

CITY OF PEORIA, a Municipal Corporation,
Appellee.

On Appeal from the Supreme Court of the State of Illinois.

MOTION TO DISMISS.

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MOTION TO DISMISS.

Appellee, pursuant to Rule 16, moves to dismiss this appeal on the grounds: (a) that there is not drawn in question the validity of a city ordinance having the effect of a statute as required by Title 28, United States Code, Section 1257 (2); and (b) that the appeal does not present a substantial federal question.

STATEMENT.

This case involves a typical public utility franchise. Appellant was incorporated for the express purpose of obtaining a franchise from Appellee, and a Certificate of Public Necessity from the Illinois Commerce Commission to operate motor buses as a public utility.

Appellant obtained the franchise from Appellee before it obtained a Certificate from the Illinois Commerce Commission. This franchise, adopted in 1946, and accepted by Appellant granted to Appellant and its successors and assigns the exclusive right to operate a motor bus system on the streets of Peoria, and provided for the payment of compensation to Appellee for the exercise of the rights and privileges granted to Appellant.

Appellant paid the compensation provided for more than eight years, but made no payments after January 1, 1954.

Suit was instituted in August, 1954, to collect the compensation due under the franchise, and while the suit was pending, Appellant transferred its assets to another company and ceased to do business.

Judgment was entered in August, 1956, by the Circuit Court of Peoria County for the amount due under the terms of the franchise during the period from January 1, 1954 to May 4, 1955, the date of the transfer of assets to the other company.

The judgment was affirmed by the Illinois Supreme Court on the grounds: (1) that there was consideration for the undertaking of Appellant to pay compensation; (2) that the amount provided for as compensation did not exceed the cost of regulation and that it was the amount to which Appellant had agreed; (3) that Appellant is estopped to urge the objections which it now raises by reason of its acceptance of the franchise; and (4) Appellee had the power under the laws of Illinois to regulate.

ARGUMENT.

I.

Franchise Not a State Law.

This case involves a typical public utility franchise, which was accepted and acted upon by Appellant and thereupon became a binding contract, which the Appellant is estopped from repudiating.

Only general ordinances having the effect of a general legislative enactment are within the purview of Title 28, United States Code, Section 1257 (2). **John P. King Mfg. Co. v. City Council of Augusta, 277 U. S. 100; Reinman v. Little Rock, 237 U. S. 171; Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548.**

It is clear, therefore, that this case does not involve the type of ordinance required for jurisdiction in this Court.

II.

No Federal Question Involved.

It is essential to the exercise of this Court's jurisdiction that a substantial federal question be raised before the State Court. The Illinois Supreme Court did not decide any federal question. Appellant attempts to hurdle this obstacle by stating that a substantial federal question was raised and ignored by the Illinois Supreme Court.

In its brief, filed with the Illinois Supreme Court, Appellant relied upon the following points:

I. **The Ordinance as Amended Is Special Legislation Depriving Defendant of Its Property Without Due Process of Law, Contrary to Article II, Section 2 of the Illinois Constitution, and the Fourteenth Amendment to the Federal Constitution.**

II. **The Ordinance as Amended, as a Tax Measure, Violates Article XI, Section 9 of the Constitution of**

Illinois, in That It Is Not Uniform in Respect to Persons and Property Within the Municipality.

III. The Ordinance Grants a Special Privilege and Immunity Contrary to Article II, Section 14, of the Illinois Constitution.

IV. The Ordinance as Amended Is Unconstitutional Because It Delegates Legislative Power to Change the Terms of the Ordinance to a Board of Arbitrators.

V. The Purported Contract Between Plaintiff and Defendant for Use of the Streets by Virtue of the Ordinance and Its Acceptance Is Without Consideration Because Plaintiff Gave Nothing to Defendant for the Percent of Gross Income. Defendant Had a Right to Use the Streets to Operate Motor Buses Without Any Grant From Plaintiff.

VI. The City Has Only Such Powers as Have Been Granted to It By the Legislature By Statute. There Is No Statute Giving the City the Power to Enact the Ordinance Here in Question.

VII. The City Has No Power to Charge a Percent of Gross Receipts for Use of Streets by Buses.

The only reference to the Fourteenth Amendment to the Federal Constitution was in Point I. Of the thirty-two pages of Argument contained in its brief, slightly more than one page was devoted to Point I.

For the convenience of the Court there is set forth in the Appendix to this Motion, the **Points and Authorities** set forth in Appellant's Brief, and the Argument therein as relates to Point I.

This Court has no jurisdiction to re-examine the judgment of a State Court unless the record shows that a federal question necessary to the determination of the case is involved. **Durley v. Mayo, 351 U. S. 277.**

The record in this case shows no such question to be involved.

III.

The Federal Question Presented Is Not Substantial.

It is startling to observe that the due process clause of the Federal Constitution is attempted to be used as an excuse to break a contract.

Certainly it requires no citation of authorities that the prohibition against taking property without due process of law has no application to the payment of money due under a contract.

Mackay Telegraph Co. v. Little Rock, 250 U. S. 94, involved a franchise ordinance providing for a "license or tax of 50 cents per pole." The company accepted the franchise and then didn't pay the fees. Suit was instituted in the State Court and the company appealed to this Court. One of the grounds raised by the company was that the franchise deprived it of property without due process of law. This Court noted that the State Court dealt with the ordinance as a license tax even though the ordinance was contractual in nature and therefore said it must be so regarded. Notwithstanding, this Court held that the company was liable, and that there was no ground for holding that the company was subjected to unreasonable discrimination in contravention of the equal protection clause of the Fourteenth Amendment.

Zucht v. King, 260 U. S. 174, is directly in point, and requires no discussion.

The Supreme Court of Illinois held that the franchise was a valid exercise of the city's regulatory powers under the State law.

The decision of the highest State Court that the franchise is within the powers conferred by the legislature is conclusive on this Court. **Thomas Cusack v. Chicago, 242 U. S. 526; Schmidinger v. Chicago, 226 U. S. 578; Fischer v. City of St. Louis, 194 U. S. 361.**

Appellant relies upon City of Antonio v. San Antonio Public Service Co., 255 U. S. 547, and Railroad Commissioners v. Los Angeles Railway Corporation, 280 U. S. 145, as indicating a substantial federal question is involved in this case.

Neither of these cases are in point. Both came up on appeal from decisions of lower federal courts.

Both cases involved the question of rates being fixed by franchise ordinances, which were alleged to be confiscatory.

In both cases this court recognized the rule that it was bound by the State law as decided by the highest court of that State.

In the City of Antonio case, this Court held that under the State Constitution and its own previous decision the ordinance was not a contract. In the Los Angeles Railway case, this Court said there was no decision of the highest State Court for it to follow.

Accordingly, Appellant has failed to present any substantial question of "due process" or "equal protection" under the Fourteenth Amendment.

Conclusion.

We respectfully submit that this appeal should be dismissed. We further respectfully submit that there is no reasonable ground for granting a petition for writ of certiorari pursuant to the provisions of Title 28, United States Code, Section 2103. We further request the Court to adjudge Appellee reasonable damages for its delay and double costs.

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POINTS AND AUTHORITIES.

I. The ordinance as amended is special legislation depriving defendant of its property without due process of law, contrary to Article II, Section 2 of the Illinois Constitution, and the Fourteenth Amendment to the Federal Constitution.

A. The ordinance singles out this defendant from all users of the city streets and requires it alone to pay for use of the streets. Due process of law guarantees a person the right to be governed by a general law applicable to all similarly situated.

Metropolitan Trust Co. v. Jones, 384 Ill. 248, 253.

II. The ordinance as amended, as a tax measure, violates Article XI, Section 9, of the Constitution of Illinois, in that it is not uniform in respect to persons and property within the municipality.

A. Article XI, Section 9, of the Illinois Constitution, provides that any tax made by municipal authorities must be uniform as to persons and property within its jurisdiction.

1. The city has contended it has a right to assess this 3% levy on gross receipts under Ch. 24, Ill. Rev. Stat., par. 23-53, wherein it is authorized to tax vehicles conveying loads within the municipality.

2. The 3% charge on this defendant alone to the exclusion of all others violates the requirement of uniformity as to persons.

III. The ordinance grants a special privilege and immunity contrary to Article II, Section 14, of the Illinois Constitution.

A. Section XII of the ordinance provides that in consideration of the payment by defendant it is granted im-

munity from all license fees, charges, taxes or assessments except property taxes and special assessments.

B. Article II, Section 14 of our Constitution, prohibits any irrevocable grant of special privileges or immunities which in Callaghan & Co. v. Burdette J. Smith, 304 Ill. 532, was held to be violated where one company was granted the right to publish a statute purporting to be under State authority.

C. The grant of immunity from taxes in the present case violates this constitutional provision.

D. Where part of the consideration for a promise is illegal, the whole transaction or contract is void.

Henderson v. Palmer, 71 Ill. 579;
Estate of Ramsay v. Whitbeck, 183 Ill. 550, 556;
Lyons v. Schambacher, 316 Ill. 560;
Vock v. Vock, 365 Ill. 432, 434;
Simpson v. Adkins, 386 Ill. 64.

IV. The ordinance as amended is unconstitutional because it delegates legislative power to change the terms of the ordinance to a board of arbitrators.

A. Section XII of the ordinance provides that the percentage of gross revenue to be paid is subject to change at 5-year intervals between certain limits by a board of arbitrators.

B. An ordinance was held unconstitutional as an unlawful delegation of legislative power which left to the discretion of the city treasurer to fix the amount of a liquor license not to exceed $50. City of East St. Louis v. Wehrung, 50 Ill. 28; the ordinance was held void where the mayor was authorized to fix the license fee between $2 and $10, Naegle v. City of Centralia, 81 Ill. App. 334.

C. Only a city council by ordinance has the power to amend an ordinance.

Hibbard & Co. v. City of Chicago, 173 Ill. 91, 97;
City of Litchfield v. Hart, 306 Ill. App. 621, 624.

V. The purported contract between plaintiff and defendant for use of the streets by virtue of the ordinance and its acceptance is without consideration because plaintiff gave nothing to defendant for the percent of gross income. Defendant had a right to use the streets to operate motor buses without any grant from plaintiff.

A. It has been definitely decided by this court that a company has the right to operate motor buses upon city streets without any grant or franchise from the city; that there is no statutory authority permitting a city to require a grant from itself.

Chicago Motor Coach Company v. City of Chicago, 337 Ill. 200.

B. The legislature recognized there was no such statutory authority in a city to require a grant or franchise for motor buses because it expressly enacted such a statute in Ch. 24, par. 21-44, but limited it solely to the City of Chicago.

C. The case of Lustfield v. Chicago Transit Authority, 408 Ill. 404, quoted the Chicago Motor Coach Co. case as establishing the law that motor buses do not need a grant from a city to operate on city streets.

D. A company which agreed to pay a consideration for a grant of purported authority to lay tracks, when the grantor had no power to make such a grant, received no consideration for its promise and was not estopped by accepting the ordinance granting such alleged authority to raise the question of lack of consideration.

South Park Commissioners v. Chicago City Railway, 286 Ill. 504.

VI. The city has only such powers as have been granted to it by the legislature by statute. There is no statute giving the city the power to enact the ordinance here in question.

A. A city has only such powers as are expressly granted to it by statute which must be strictly construed.

City of Chicago Heights v. Western Union, 406 Ill. 419, 433.

Village of Lombard v. Illinois Bell Telephone Co., 405 Ill. 209.

B. While the city has express statutory authority to prohibit the laying of street railway tracks in its streets (Ch. 24, par. 23-29; Ch. 131¼, par. 1-4); to prohibit the occupancy of streets by telegraph poles, wires, etc (Ch. 134, par. 4), it has no such power to prohibit the use of streets by motor buses.

VII. The City Has No Power to Charge a Percent of Gross Receipts for Use of Streets by Buses.

A. An ordinance which required payment of 3% of gross revenues for occupying streets with poles and wires was held invalid because the city has no power to rent or charge for use of streets, nor tax gross receipts for revenue purposes.

Village of Lombard v. Illinois Bell Telephone Co., 405 Ill. 209.

B. An ordinance which required payment of a sum per pole per year and so much per foot for wire occupying streets was held invalid as not being a regulatory ordinance for which a fee was charged to cover the cost of such regulation, but was a revenue measure beyond the power of the city.

Chicago Heights v. Western Union Telegraph Co., 406 Ill. 428.

C. An ordinance which required payment of 2% of gross revenues for occupying streets with poles and wires was held invalid as lacking in uniformity because the fee had no relation to the amount of space used, and furthermore, was beyond the power of the city:

City of Chicago Heights v. Public Service Co., 408 Ill. 34.

ARGUMENT.

I. The ordinance as amended is special legislation depriving defendant of its property without due process of law contrary to Article II, Section 2, of the Illinois Constitution and the Fourteenth Amendment to the Federal Constitution.

The ordinance as amended exacts a sum of money for use of the streets from this defendant alone. It does not even attempt to levy this exaction upon any class to which this defendant might belong. It singles this defendant out by name as the sole subject to pay tribute to the city for the use of the streets.

Due process requires that laws be general in their terms. If a law even singles out one group of persons (much less one particular person) to the exclusion of others similarly situated, it violates due process. In Metropolitan Trust Co. v. Jones, 384 Ill. 248, 253, this court stated:

> "Due process of law contemplates a general public law, legally enacted, binding upon all members of the community under all circumstances, and not partial or private laws affecting only the rights of private individuals or classes of individuals."

Taxicab operators are not charged for use of the streets. Operators of delivery businesses by trucks who use the streets are not charged for their use. Trucking companies making use of city streets to carry on their businesses are not charged. Other bus companies using city streets are not charged for use of the streets. The sole and only users of city streets required to pay for such use is this defendant.

This ordinance, therefore, violates the constitutional right of this defendant to be governed by a general law and not subject to a special law which singles it out by name from among all users of city streets and requires it alone to pay for the use of the streets.